BEFORE THE
UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON D.C.

STEEL

(INVESTIGATION NO. TA-201-73)

PREHEARING SUBMISSION ON INJURY OF THE EUROPEAN COMMISSION

10, September 2001

1. Introduction

This pre-hearing submission is filed on behalf of the Commission of the European Communities ("European Commission") [1]. The European Commission is very concerned by the possible application of safeguard measures to imports of certain steel products ("steel") into the United States.

Safeguard measures are an exceptional and temporary remedy to deal with emergency situations. They may potentially give rise to serious trade disturbances of very damaging consequences. In this case, which globally involves goods worth more than US$ 17 billion (of which US$ 6 billion are originating in the European Communities), the imposition of such measures would seriously affect imports into the United States and divert a large share of the steel trade to other geographical areas, including Europe.

For this reason, it is essential that all the conditions and requirements set out in Article XIX GATT and in the WTO Agreement on Safeguards are carefully respected. The ITC must ensure that these requirements are met in the context of a fair and open investigation.

This submission only contains certain preliminary considerations on the case under examination. This however does not prejudice the position of the European Commission on all aspects of substance and procedure which will arise within the investigation.

In this regard, the European Commission wishes to express immediate concern at the way this investigation has been initiated and is being conducted. The European Commission has noted that, due to the complexity of determining the precise product scope of this investigation (with hundreds of HTS items having been excluded) the information made available by the ITC upon initiation and until the hearing on injury is limited to a long list of trade statistics. In fact, no indication has been given as yet on the crucial issue of the "like or directly competitive product", neither is any information available on all other factors that are key for a safeguard determination (e.g. domestic production, sales and consumption, various injury indicators, etc).

The European Commission appreciates the difficulty of taking a position, if only preliminary, on these issues, in particular given the need for all excluded products to be removed from the picture. Yet, a sufficient knowledge, if only preliminary, of these elements is essential for taking a position on whether safeguard measures are warranted here. The European Commission is certainly not in a position, at this stage, to extrapolate and evaluate any reliable data on the situation of the US market and US producers.

Thus, the forthcoming hearing on injury does not provide an adequate opportunity for discussing in sufficient detail these issues, contrary to what is implied by Article 3(1) of the WTO Agreement on Safeguards. Hence, the European Commission expects to be given other opportunities to comment both orally and in writing on these issues prior to the release by the ITC of its injury determination.

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[1] The considerations expressed in this submission are without prejudice to any claim or argument the European Commission may wish to advance in any further proceeding before the WTO under the Dispute Settlement Understanding.

Following are some preliminary considerations on some individual issues.

2. Definition of "like or directly competitive product" under the Agreement on Safeguards

The European Commission is concerned at the approach taken by the US on this issue which is crucial to the injury and remedy determinations. In its request to initiate an investigation under section 202 of the Trade Act of 22 June 2001, the USTR refers to four macro-categories of steel to be included in the current investigation.

These macro-categories are:

- Certain carbon and alloy flat products;
- Certain carbon and alloy long products;
- Certain carbon and alloy pipe and tube; and
- Certain stainless steel and alloy tool steel products.

These product areas include more than 600 different steel products and have been subdivided by the ITC into 31 individual product groups, with some hundreds of individual HTS items having been excluded from the scope of the investigation.

The European Commission notes that, until now, there is a complete lack of clarity on what constitutes the "like or directly competitive products" and the "domestic industries" in this case, namely whether they are intended to coincide with each of the four main product categories or each of the 31 individual products groups or any other product categorisation. The European Commission wonders whether this lack of clarity is deliberate, in that it can allow the ITC more flexibility to single out situations in which import increases can be matched with "favourable" injury indicators. The European Commission expects that the ITC takes soon a clear position on this issue, and wishes to remind to the ITC that the guiding principle on this delicate issue, as reflected in WTO rules, is the need to avoid any abuse of protectionist measures.

Furthermore, the European Commission notes that no justification has been provided to the exclusion of certain items from the scope of the investigation. To the contrary, it would appear that the opinion of the US industry alone drives the decisions of USTR or ITC in this area. Without prejudice to its position on the substance of this matter, i.e. whether some of these exclusions can indeed be justified, the European Commission considers that this way to proceed is not acceptable.

In general terms, the European Commission is of the view that the ITC should not limit its injury examination to the four macro-categories. Such a voluntary limitation would certainly lead to an incorrect picture of the impact of the steel imports into the US, since the products included in the current investigation are too different and cannot be analysed and assessed in a cumulative manner. The European Commission strongly opposes any such approach, which can only lead to include different types of products into blanket determinations and measures.

It is reminded that Article 2 of the Agreement on Safeguards requires that imported goods are confronted with the *"like or directly competitive product"*. While this definition may be seen

as larger in scope than similar definitions under the WTO anti-dumping and anti-subsidy legislation, it can certainly not be stretched as to include products that are clearly too different in terms of physical and technical characteristics and intended use.

3. Requirements for imposing safeguards measures

a) "Unforeseen developments" requirement

The WTO Appellate Body has, on many occasions [2], stated that *"any safeguard measure imposed (…) must comply with the provisions of both the Agreement on Safeguards and Article XIX of the GATT 1994"*. In the above rulings, the Appellate Body expressly rejected the idea that requirements of GATT Article XIX which are not reflected in the Agreement on Safeguards be superseded.

Article XIX of the GATT implies the fulfilment of three main conditions which need to be met for the imposition of a safeguard measure under the SA. These conditions are (a) the rise of imports (b) causing or threatening to cause (c) serious injury to the domestic industry.

Article XIX of the GATT also requires that the increase of imports be the "*result of unforeseen developments"* and the effect of *"the obligations incurred by a Member under this Agreement, including tariff concessions"*. "Unforeseen developments" is synonym of "unexpected" with reference with what was and was not actually foreseen.

The WTO Appellate Body also stated this is a circumstance which must be demonstrated as a matter of fact in the investigation report before the safeguard measures is applied.

The European Commission requests that the ITC carefully reviews this requirement in the context of its investigation, and that it positively demonstrates, if deciding to recommend safeguard measures, that the current steel crisis is the result of "unforeseen developments".

The European Commission expects that, according to Article 3.1 SA, the report setting forth the findings and reasoned conclusions of the Investigating Authority expressly includes a separate and duly motivated finding on the existence of unforeseen developments.

On substance, the European Commission wishes to make the following preliminary comments on this issue:

- The negative situation of certain US steel firms is not recent and has its roots, for example, in the lack of investments during the last two decades, in the untenable social charges which overload the US steel companies, and in general in a commercial approach which is no longer able to face the increasing and changing world competition.

- The current reduction in sales, which also involves the foreign exporters, relates to the general slowing down of the US economy. This is a cyclical event which is reasonably predicted by economic experts and therefore cannot constitute a "surprise".

[2] Argentina–Footwear, Korea–Dairy Products and United States -Lamb

- The US steel sector was in the past fully aware of this difficult situation, but instead of removing the structural obstacles to a renewed competitiveness, preferred recourse to trade remedies (Safeguards, AD and CVD) or to financial support from the US Administration or local Governments.

The European Commission believes that the existence of unforeseen developments can hardly be demonstrated here: the long lasting structural weakness of the US steel industry makes it difficult to believe that difficulties were unforeseen. Similarly, it is difficult to argue that the cyclical downturn of steel demand could not reasonably be predicted.

b) "Imports in such increased quantities and under such conditions" requirement

Article 2 SA stipulates that goods must be imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to a domestic industry. According to the AB Ruling in Argentina/Footwear, the increase in imports must be sudden, recent, sharp and significant.

The US legislation standard on this issue, as well as past ITC practice, that a mere increase of imports is sufficient, either in absolute terms or relative to domestic production, is clearly not in line with this ruling. Therefore, the European Commission urges the ITC to adapt the applied standard accordingly in the assessment of the present case.

The European Commission finds it impracticable to make detailed comments on substance at this stage, given that well over 600 products have been included in this proceeding. However, at this preliminary stage, the European Commission has strong doubts as to whether the criteria of Article 2 SA can be met for a large number of products.

A first analysis of available data shows that recent imports of almost all products concerned have decreased quite substantially. This trend is very evident when looking at the first semester of 2001. This would indicate that any import surge is already over, and therefore the imposition of measures could not be justified any more.

Furthermore, if looked on a two years period between 1998 and 2000, imports of the two biggest product groups, flat and long products, which represent almost 90% of all steel imports, have decreased substantially.

As far as prices of imported goods are concerned, the European Commission lacks the details to take a conclusive position at this stage. However, the information available appears to suggest that, while there may have been a slight decrease during 1999, import prices have increased in 2000 and thereafter.

For these reasons alone, it is doubtful whether imports were in such increased quantities and under such conditions as to cause or threaten to cause serious injury.

c) "Serious injury of threat thereof" and "causality" requirements

The Agreement on Safeguards requires that imports cause or threaten to cause serious injury to the domestic industry. Article 4(1)(a) of the Agreement on Safeguards defines serious injury as "a significant overall impairment in the position of a domestic industry". The standard of

"serious injury" is therefore a very high one, certainly significantly higher than the standard of "material injury" required in, for example, anti-dumping investigations.

In order to make a determination on the existence of serious injury or threat thereof, the Agreement on Safeguards requires the competent authorities to evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of the industry, "in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilisation, profits and losses, and employment".

The European Commission doubts that the high standard of injury referred to above can be met in this case. In any event, it expects the ITC to undertake a complete analysis all relevant factors, and that this analysis is undertaken for all the like and directly competitive products identified.

The European Commission attaches great importance to the fact that the economic and financial situation of all US producers is fully analysed, or, if a sample is chosen, that this is fully representative of the situation of the whole US industry. The European Commission is aware that while some US producers may have had negative performances in recent years, some other have been profitable. It therefore submits that any injury finding that is solely based on a relative decline in the indicators of arbitrary selected companies would not be representative and thus incompatible with a finding of injury under the Agreement on Safeguards.

The European Commission also hopes that, as stated above, a number of factors other than imports appear to have contributed to the situation of the US steel industry, such as e.g. the price depression due to increased domestic capacity and to the resulting competition. The European Commission urges ITC to analyse these factors very carefully, and to clearly separate the injury caused by other factors from the injury caused by increased imports.

It is recalled that Article 4.2(b) SA states that a determination of serious injury or threat thereof shall not be made unless an investigation demonstrates the existence of the causal link between increased imports and injury. When factors other than increased imports are causing injury at the same time, such injury shall not be attributed to increased imports.

As recently ruled by the Appellate Body in US Lamb, this means in essence that a genuine and substantial relationship of cause-effect between increased imports and serious injury must be determined. The European Commission therefore submits that the US legislation standard and the past practice of ITC, which consisted in merely determining that increased imports were "a cause no less important than any other cause" is inconsistent with Article 4.2(b) SA, and urges ITC to change its practice accordingly.

4. NAFTA and other FTA partners

In previous safeguard investigations (Steel wire rod, Welded line pipe), the ITC, in analysing the injury, has firstly included exports from NAFTA countries in the overall calculations and injury assessment, and then has decided to exclude the same countries from the remedy.

The European Commission has repeatedly conveyed to the US that that this approach is not acceptable, and the Appellate Body in Wheat Gluten has confirmed it.

The European Commission submits that the ITC should make its injury determination without excluding NAFTA partners or other countries with which the US has FTA Agreements, and that any safeguard measure should apply to imported products *"irrespective of its source"* as stipulated by Article 2.2 SA.

In this case any exclusion of NAFTA countries would be unjustified even under the (WTO incompatible) US standard. Canada and Mexico are both among the 10 most important exporters of steel to the US. In particular Canada has acquired special prominence on the US steel market. According to the US official statistics both these countries have steadily increased their market share, since the entry into force of the North American Free Trade Agreement. Incidentally, the same applies to the other countries with which the US has free trade agreement, i.e. the Caribbean Basin Economy Recovery Act countries, the beneficiaries of the Andean Trade Preference Act, and Israel.

For these reasons, the European Commission submits that any investigation and measures should be truly *erga-omnes*.

6. Existing CVD and AD measures against steel products

The United States has a long track record of AD and CVD measures against steel imports. These measures concern nearly all main world steel producers and involve many of the products included in the current safeguard investigation. While certain measures are somewhat old, several have been imposed during the last three years.

The European Commission is concerned that for products already covered by AD and CVD measures, US producers may end up enjoying an undue double relief via the imposition of additional safeguard restrictions.

This would be inconsistent with Article 5(1) of the SA which requires that safeguard measures be applied *"only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment"*. The Commission attaches great importance to the fact that this provision is respected. The European Commission reminds that while there is no mandatory "lesser duty" rule for AD and CVD at WTO level, safeguard rules are very clear on this issue. Therefore, to the extent that injury or is already remedied by existing AD and CVD measures, no safeguard action should be taken. The European Commission expects the ITC to seriously consider this issue and to limit the scope of any safeguard measure accordingly.

7. Conclusions

In conclusion, the European Commission wishes to stress once more its serious concerns at this investigation and at the way it has been initiated and is being conducted. The European Commission considers that, given in particular the huge trade volumes involved, the ITC should take the utmost care to respect all conditions and requirements provided by WTO rules and related jurisprudence.

The European Commission takes the view that certain basic requirements under WTO safeguard rules cannot be met. In particular, unforeseen developments do not appear to be present here and imports are for most products not "in such increased quantities" and "under such conditions", as to cause serious injury. The European Commission also doubts that serious

injury for the entirety of US producers, or for a major proportion of them, can be demonstrated.

Finally, the European Commission expects the ITC to pay special attention to avoiding that any safeguard measures affords undue double relief to US producers as regards imports already covered by other trade defence measures.

The European Commission respectfully requests the ITC to take its views into consideration and reserves its right to submit more detailed comments on injury, both orally and in writing once better information is made available.